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REPORT TO PUBLIC SAFETY AND NEIGHBORHOOD SERVICES COMMITTEE

LEGAL ANALYSIS OF POTENTIAL FUNDING SOURCES FOR GRAFFITI TRACKER

INTRODUCTION

At the September 22, 2010, meeting of the Public Safety and Neighborhood Services Committee (Committee), the Committee heard testimony about a Graffiti Tracker Program (Program), proposed by Graffiti Tracker, Inc. The Program is regional, with other cities in the County and the County itself participating. The goal of the Program is to track offenders by matching their graffiti markings or "tags" that occur in various geographical locations, and developing multiple cases against a single offender, thereby increasing the potential penalty and the restitution fee once the offender is convicted. The Program requires the purchase of equipment and entering into a contract with Graffiti Tracker, Inc.

QUESTION PRESENTED

The Committee asked our Office to analyze whether the following funding sources could be used to pay for the Program: Redevelopment Agency tax increment funds, Community Development Block Grant (CDBG) funds, asset forfeiture funds, and infrastructure funds.

SHORT ANSWER

Redevelopment Agency tax increment funds, CDBG funds, and infrastructure funds cannot be used for this purpose. However, Redevelopment Agency tax increment funds can be used to remove graffiti in Redevelopment Project Areas, which may free up general funds that could be used for the Program. There does not appear to be a legal prohibition against the use of asset forfeiture funds, however, it is our understanding that the San Diego Police Department will further address this issue with the Committee. Infrastructure funds are not available,[1] however, to the extent there are any unassigned general fund monies, those can be appropriated in accordance with the budget process and used for this Program.

[1] City Att'y MOL No. 10-19 (Sept. 24, 2010)

ANALYSIS

I. REDEVELOPMENT TAX INCREMENT FUNDS

The Redevelopment Agency is a public body, corporate and politic, that exercises governmental functions and has the powers prescribed to it in the California Community Redevelopment Law (Community Redevelopment Law). Cal. Health & Safety Code §§ 33100, 33122. The Community Redevelopment Law is set forth at California Health and Safety Code sections 33000-34160. Since the Agency is a creature of statute, the Agency's authority to act and spend funds must be provided in the Community Redevelopment Law.

The primary funding source relied on by the Agency to finance its activities under the Community Redevelopment Law is tax increment revenue. Tax increment revenue is the Agency's ability to receive and spend a portion of property tax revenues from the increase in assessed value of real property that has occurred after adoption of a redevelopment plan for a project area. Cal. Health & Safety Code §§ 33670, 33678. Tax increment revenue is used "to pay the principal of and interest on loans, moneys advanced to, or indebtedness (whether funded, refunded, assumed, or otherwise) incurred by the redevelopment agency to finance or refinance, in whole or in part, the redevelopment project." Cal. Health & Safety Code § 33670(b); Cal. Const. art. XVI, § 16.

Tax increment revenue must be spent on redevelopment activity. Redevelopment activity, as described in California Health and Safety Code sections 33020 and 33021, must primarily benefit the project area. Cal. Health & Safety Code § 33678(a) and (b).

Redevelopment is defined as the planning, development, replanning, redesign, clearance, reconstruction, or rehabilitation, or any combination of these, of all or part of a survey area, and the provision of those residential, commercial, industrial, public, or other structures or spaces as may be appropriate or necessary in the interest of the general welfare, including recreational and other facilities incidental or appurtenant to them. Cal. Health & Safety Code § 33020.

Additionally, redevelopment is defined to include: (a) the alteration, improvement, modernization, reconstruction, or rehabilitation, or any combination of these of existing structures in a project area; (b) the provision for open-space types of use, such as streets and other public grounds, space around buildings, public or private buildings, structures and improvements, and improvements of public or private recreation areas and other public grounds; and (c) the replanning or redesign or original development of undeveloped areas that are stagnant or improperly utilized or that require replanning and land assembly for reclamation or development in the interest of the general welfare. Cal. Health & Safety Code § 33021.

At first glance, the Program appears to fall within the purview of section 33420.2 of the California Health and Safety Code, the only section of the Community Redevelopment Law that addresses graffiti. However, a closer reading of the statute reveals otherwise. Section 33420.2

specifically provides for the removal of graffiti as opposed to the prevention or elimination of graffiti, as the Program proposes to do. Section 33420.2 specifically states:

> Within a project area, an agency may take any actions that the agency determines are necessary to ***remove*** graffiti from public or private property upon making a finding that, because of the magnitude and severity of the graffiti within the project area, the action is necessary to effectuate the purposes of the redevelopment plan, and that the action will assist with the elimination of blight, as defined in Section 33031.

Emphasis added.

No case law currently exists to further interpret section 33420.2. Therefore, to better understand this law, statutory construction is required. The rules of statutory construction are set forth in a number of court opinions. (See, e.g., *Coburn v. Sievert,* 133 Cal. App. 4th 1483, 1494-96 (2005); *People v. Haynie,* 116 Cal. App. 4th 1224 (2004).) The goal of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. *Day v. City of Fontana,* 25 Cal. 4th 268, 272 (2001). Generally, the words of the statute provide the most reliable indication of legislative intent. *People v. Haynie* at 1228. The first step is to look at the words used by the legislature and give them their usual, ordinary meaning. *Neilson v. City of California City,* 146 Cal. App. 4th 633, 643 (2007), citing *Garcia v. McCutchen,* 16 Cal. 4th 469, 476 (1997). If there is no ambiguity, it is presumed that the lawmakers meant what they said, and the plain meaning of the language governs. *Day v. City of Fontana* at 272. Generally, the analysis of statutory language ends once a court has determined that the words used are clear and unambiguous. *Neilson* at 643, citing *Hughes v. Board of Architectural Examiners,* 17 Cal. 4th 763, 775 (1998).

Here, no courts have interpreted section 33420.2. What results is a simple examination of the words and grammar of section 33420.2, which should lead to the conclusion that the language is clear and intelligible and suggests but a single meaning. In drafting and adopting section 33420.2, the legislature chose to use the word "remove." The legislature did not use the word "eliminate," "prevent," "abate," "eradicate" or some other word related to stopping graffiti. The specific use of the word "remove" can only be interpreted to mean that the legislature purposely intended for the statute to provide for the physical removal of graffiti and not some other indirect form of graffiti abatement.

A review of the legislative history of section 33420.2 (Stats. 1994, c. 381 (S.B. 1515), § 1.) supports this interpretation of the statutory language, especially as it relates to the word "remove." When Senate Bill 1515 was initially introduced on February 15, 1994, the Legislative Counsel's Digest indicated that the bill "[w]ould also authorize a redevelopment agency to make grants to local community organizations for the purposes of achieving the eradication of graffiti and the beautification of neighborhoods within project areas." However, the language, "for the purposes of achieving the eradication of graffiti"—which lends itself to a broader interpretation of the current version of the statute—does not appear in the Final

Legislative Counsel's Digest, nor in the statute's present version. Without this broader language, it is clear that the selection of the word "remove" was intentional. "Remove" strictly means that the legislature intended for graffiti to be taken away. As a result, section 33420.2 provides only for direct graffiti removal and thereby precludes the use of Agency funds for the Program. The proposed project by Graffiti Tracker, Inc. does not provide for the removal of the graffiti vandalism, rather it only provides a method of tracking it with the hope of reducing it.

Additionally, tax increment revenue must be spent on redevelopment activity that primarily benefits the project area. Cal. Health & Safety Code § 33678(b). The requirement that the use of tax increment funds shall primarily benefit the project area serves to preclude a redevelopment agency from spending tax increment funds for many community facilities that solely provide a general community benefit and do not primarily benefit the project area from which the tax increment is generated. Coomes, Jr., et al. *Redevelopment in California* (2009) p. 223. The issue of graffiti vandalism is a City-wide concern. Thus, without the specific authority in the Community Redevelopment Law to provide for the use of tax increment revenue to track graffiti, the use of tax increment for these purposes may be considered contrary to the requirements set forth in California Health and Safety Code section 33678(b) in that such expenditure would provide a broad community benefit rather than a benefit primary to the project area.

The Agency is a creature of statute. The Agency's authority to act and spend funds must be provided in the Community Redevelopment Law. The Community Redevelopment Law does not provide the requisite authority for the Agency to use Agency funds for the Program. Nevertheless, it is possible for Agency tax increment funds to be used for the actual removal of the graffiti in redevelopment project areas, which may free up general funds that could be used for the Program.

II. CDBG FUNDS

In order to utilize CDBG funds, the proposed project must *both* satisfy a national objective and qualify as an eligible activity. National objectives include "Activities that Benefit Low and Moderate Income Individuals" (LMI) and "Activities to Eliminate or Prevent Slum or Blight." *See* 24 C.F.R. §§ 570.208(a) and (b).

To satisfy the national objective that the activity benefits LMI individuals, the activity must be considered one of the following: (1) An Area Benefit Activity; (2) A Limited Clientele Activity; (3) A Housing Activity; or (4) Job Creation or Retention. *See* 24 C.F.R. § 570.208(a).

The Program does not involve a Housing Activity or Job Creation or Retention. It is also not a Limited Clientele Activity because it does not serve a specific clientele such as seniors or disadvantaged youth. To qualify as a Limited Clientele Activity, the benefit from such an activity cannot be available to all residents of an area. *See* 24 C.F.R. § 570.208(a)(2). The benefit of the Program would be available to all the residents of the City.

The next step is to analyze whether the Program could qualify as an "Area Benefit Activity." It could only do so if its use were limited to very specific areas of the City of San Diego. As a threshold matter, in order to meet the requirements of an "Area Benefit Activity," an eligible activity must be undertaken within the jurisdictional boundaries of the City where at least 51 percent of the residents who benefit have incomes that are low or moderate. *Id.* However, even if the use of the Program were limited to specific areas of the City where 51 percent of the residents qualify as LMI, HUD would not approve the purchase of the Program as an eligible CDBG activity. In fact, the purchase of equipment is generally considered an ineligible CDBG expenditure unless the equipment constitutes all or part of a public service such as a van for a disadvantaged youth program. *See* 24 C.F.R. §§ 570.201(e) and 570.207(b)(1).

An eligible activity such as "public services" typically involves an education, counseling, assistance, or treatment component to serve the LMI population. *See* 24 C.F.R. 570.201(e). As set forth previously, no specific clients are being served by the acquisition of the Program. The City's CDBG Program Unit has stated that HUD's computerized reporting system, known as the Integrated Disbursement and Information System (IDIS), requires demographic information to be obtained and reported to them concerning individual clients benefitted whenever the eligible activity involves the provision of public services. With no specific clients served and no case manager involved, there is no way to meet HUD's reporting requirements.

Furthermore, this Office has conferred with the City's CDBG Program Unit which indicates that there is no precedent for the acquisition of such a law enforcement assistance software program with the use of CDBG funds. Based on information received from the City's CDBG Program Unit, this Office is informed that HUD generally disfavors and disallows purchases of technology equipment with CDBG funds. The City's CDBG Program Unit has conferred with a HUD representative who has indicated that such an expenditure is not allowed with CDBG funds as HUD has indicated that it considers the tracking of graffiti to be an ineligible general government expense. *See* 24 C.F.R. 570.207(a)(2).

Upon initial consideration, it may appear that the Program satisfies the separate national objective of being "Activity to Eliminate or Prevent Slum or Blight." However, a more in-depth analysis of HUD regulations seems to indicate otherwise. This national objective of eliminating or preventing slum or blight is met if the activities address either: (1) an area basis; (2) a spot basis; or, (3) an urban renewal area. *See* 24 C.F.R. § 570.208(b). The activity of acquiring the Program would not qualify under a "spot basis" activity for elimination or prevention of slum or blight because such activities are limited to the acquisition, clearance, relocation, historic preservation, or rehabilitation of buildings. *See* 24 C.F.R. § 570.208(b)(2). Likewise, the activity of acquiring the Program within the City would not qualify as serving an urban renewal area because this national objective typically requires a recent catastrophic event that poses a serious and immediate threat to the health or welfare of the community. *See* 24 C.F.R. § 570.208(b)(3).

In order to qualify under an "area basis," an activity must meet all of the following: (1) the City must officially designate the area as blighted, deteriorated, or deteriorating under state or local law; (2) there must be evidence of blight or decay such that there are a substantial number of deteriorated or deteriorating buildings throughout the area or public improvements

throughout the area are in a general state of deterioration; and (3) CDBG activities must be limited to those that address conditions that contributed to the deterioration. *See* 24 C.F.R. § 570.208(b)(1). According to information received from the CDBG Program Unit, there has never been any such official designation made by the City. Therefore, no proposed activity can be justified under the national objective of eliminating or prevention of blight or slums until such action is taken by the City.

Typically, "area basis" activities include the following when they address original blighting conditions: (1) acquisition and clearance of deteriorated properties; (2) installation of a park or playground; (3) façade improvements of commercial properties; and (4) treatment of toxic materials or properties to enable them to be redeveloped for a specific use. *See* NCDA Guide, CDBG Basics: Training for Practitioners, Chapter 2, p. 46 (February 2007 update). From the foregoing list of examples, it is apparent that the elimination or prevention of blight is typically related to the expenditure of CDBG funds to make a direct *physical* change to the environment. Therefore, it is unlikely that the acquisition of a software program such as the Graffiti Tracker Program would satisfy the national objective of elimination and prevention of slums and blight even if the City officially designated certain areas of the City as blight.

The proposed acquisition of the Program with CDBG funds does not appear to satisfy either a national objective or an eligible activity. Our assessment is confirmed by a recent discussion between the City's CDBG Program Unit and a HUD representative in which HUD indicated that it would be an improper use of CDBG funds to acquire the Program.

III. ASSET FORFEITURE FUNDS

A. Federal Requirements for Use of Asset Forfeiture Proceeds

Funds received from the United States Department of Justice Asset Forfeiture Program are governed by a Federal Equitable Sharing Agreement between the federal government and the local law enforcement agency. (http://www.justice.gov/criminal/afmls/pdf/aca-current-form.pdf). Pursuant to this agreement, any received funds "shall be used for law enforcement purposes in accordance with the statutes and guidelines that govern the federal equitable sharing program as set forth in the current edition of the Department of Justice's *Guide to Equitable Sharing (Justice Guide)*." The Department of Justice's *Guide to Equitable Sharing for State and Local Law Enforcement Agencies*, dated June 2009 (http://www.justice.gov/criminal/afmls/pdf/guidetoeq09.pdf), states that the funds "shall be used by law enforcement agencies for law enforcement purposes only." The *Justice Guide* lists a number of preapproved permissible uses of shared funds and property, as well as impermissible uses and other considerations. Permissible uses include investigations, training, equipment, and drug and gang education and awareness programs. Impermissible uses include paying the salaries and benefits of current, permanent law enforcement personnel (except in limited circumstances), using forfeited property by non-law enforcement personnel, purchasing food and beverages (except in limited circumstances), and extravagant expenditures. There are additional rules governing various aspects of the funds such as the interest earned and the use of the proceeds for the sale of shared property, which are not germane here.

In this case, the Program generally appears to fall within a permissible use as a tool for assisting law enforcement investigations. However, the rules require that equipment be used by law enforcement personnel. *Justice Guide* at p. 20. Under the Program, it appears that non law enforcement personnel use the cameras to take pictures of the graffiti. If the City decides to pursue the Program with asset forfeiture funds, we recommend the Police Department get approval from the fund administrators for such use of the cameras prior to making a final commitment to the Program, or that the cameras be used by law enforcement personnel.

B. California Requirements for Use of Asset Forfeiture Proceeds

We briefly address California asset forfeiture statutes. However, it is our understanding that the Police Department did not receive any such funds this past year.

1. California Uniform Controlled Substances Act

The California Uniform Controlled Substances Act (Cal. Health & Safety Code, §§ 11000-11651) provides for the forfeiture of property seized in connection with controlled substance violations.

California Health and Safety Code section 11469 provides a number of guidelines to ensure the proper utilization of the [seizure and forfeiture] laws, stating that law enforcement is the principal objective of forfeiture. Cal. Health and Safety Code § 11469(a). Section 11489(d) provides that funds distributed to law enforcement agencies "shall not supplant any state or local funds that would, in the absence of this subdivision, be made available to support the law enforcement and prosecutorial efforts of these agencies."

The Controlled Substances Act provides only limited guidance regarding the use of asset forfeiture proceeds received by a local law enforcement agency. First, 15 percent of the funds must be deposited in a fund solely for programs designed to reduce drug abuse and divert gang activity. Second, the funds may not supplant local funds in violation of section 11489(d). Therefore, the funds could not be used for salary or benefits of current, permanent personnel or presumably for any currently budgeted expenditures. The funds could, however, be used for the purchase of new equipment, training, or for funding new, temporary staff positions. Finally, since law enforcement is the principal objective of forfeiture, use of the funds for any non-law enforcement purpose would be improper.

2. Other California Forfeiture Statutes

The California Control of Profits of Organized Crime Act (Cal. Penal Code §§ 186-186.8) provides for the forfeiture of property "acquired through a pattern of criminal profiteering activity" and the proceeds of such activity. Cal. Penal Code § 186.3.

Section 186.8 provides that money forfeited or the proceeds of the sale of forfeited property shall be distributed as follows: (1) "To the bona fide or innocent purchaser, conditional

sales vendor, or holder of a valid lien, mortgage, or security interest" when so ordered by a court; (2) "To the Department of General Services or local governmental entity for all expenditures, [including expenditures for any necessary repairs, storage, or transportation of seized property,] made or incurred by it in connection with the sale of the property;" and (3) "To the general fund of the state or local governmental entity." Cal. Penal Code § 186.8(a)-(c).

In cases involving a violation of child pornography laws, "the proceeds shall be deposited in the county children's trust fund . . . [or, if] the county does not have a children's trust fund, . . . in the State Children's Trust Fund." Cal. Penal Code § 186.8(d). In cases involving human trafficking of minors for purposes of prostitution or lewd conduct, "the proceeds shall be deposited in the Victim-Witness Assistance Fund." Cal. Penal Code § 186.8(f).

In any case involving crimes against the state beverage container recycling program, the proceeds shall be deposited in the penalty account established pursuant to California Public Resources Code section 14580, except that a portion of the proceeds equivalent to the cost of prosecution in the case shall be distributed to the local prosecuting entity that filed the petition of forfeiture. Cal. Penal Code § 186.8(e). Funds in this penalty account may only be used for the purposes of the California Beverage Container Recycling and Litter Reduction Act. Cal. Pub. Res. Code § 14581(d).

IV. INFRASTRUCTURE FUNDS

This Office has opined that the funding source identified as "infrastructure funds" is not available for use without going through the City Charter required budget process, and that the funds should be considered a part of the unassigned general fund balance. City Att'y MOL 10-19 (Sept. 24, 2010). However, as part of the unassigned general fund balance, that balance may be appropriated in accordance with the Charter established budget procedures for the Program.

CONCLUSION

Redevelopment Agency tax increment funds, CDBG funds and infrastructure funds cannot be used for this purpose. However, Redevelopment Agency Tax increment funds may be used to remove graffiti in redevelopment project areas, which may free up general funds that

could be used for the Program. Asset forfeiture money could be used, subject to further clarification regarding who can use the equipment.

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